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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

1998 Biennial Regulatory Review -- Review of
the Commission's Broadcast Ownership Rules
and Other Rules Adopted Pursuant to Section
202 of the Telecommunications Act of 1996.

MM Docket No. 98-35

To: The Commission

REPLY COMMENTS OF CUMULUS MEDIA INC.

Cumulus Media Inc. ("Cumulus"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, respectfully submits these Reply Comments in response to the Commission's *Notice of Inquiry* in this proceeding ("NOI"), FCC 98-37, adopted March 12, 1998, and released March 13, 1998, 13 FCC Rcd ____, 63 Fed. Reg. 15353 (published March 31, 1998).¹ In these Reply Comments, Cumulus addresses issues regarding the local radio ownership rules discussed in various comments and other developments on that subject since the filing of Cumulus's initial Comments in this proceeding on July 21, 1998.

- 1/ These Reply Comments are timely filed, in accordance with the revised schedule for submitting Comments and Reply Comments in this proceeding that was adopted in the *Order* in this proceeding, DA 98-854, adopted and released May 7, 1998, 13 FCC Rcd ____, 63 Fed. Reg. 26758 (published May 14, 1998).

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As demonstrated in Cumulus's initial Comments, Section 202(b) of the Telecommunications Act of 1996 (the "Telecom Act") requires the Commission to adhere to the statute's specified numerical station limits, rather than engage in a case-by-case evaluation of market concentration based upon extra-statutory considerations. This conclusion is compelled by the language, structure, and legislative history of that provision. Moreover, Cumulus's experience to date confirms that radio station ownership consolidation within the Congressionally-set limits — especially in the smaller and mid-sized markets in which Cumulus operates and has sought to enter — has been pro-competitive and beneficial to the public interest by enhancing the radio broadcast product for listeners and advertisers, while achieving significant cost savings and efficiencies. No comments filed in this proceeding establish otherwise, and no factual basis exists to warrant a more restrictive limit on local radio ownership. To the extent any competitive concerns may arise in a particular case, such concerns are better addressed by the expert antitrust agencies, which can and do conduct in-depth reviews of proposed radio transactions in appropriate cases.

Since the filing of Cumulus's initial Comments, the Commission's Mass Media Bureau has granted a number of license assignment or transfer of control applications that previously had been deferred due to the Commission's staff's concerns that the acquiring entity would possess an allegedly excessive percentage of the radio station revenues in a given Arbitron-defined market, based upon BIA Research, Inc. ("BIA") data. Cumulus understands that the Mass Media Bureau (the "Bureau") staff has

now successfully processed and granted most, but not all, unopposed applications in this category.^{2/} Cumulus commends the Bureau for its diligent efforts in completing the processing of these applications.

In at least one case in which the Bureau granted a Cumulus transfer of control application, however, the staff nonetheless engaged in an analysis of alleged competitive concerns raised in an informal objection — despite the application's compliance with the numerical station limits of Section 202(b) of the Telecom Act and the Commission's local ownership rules, and despite the DOJ's determination not to pursue the very same complaint (which had been set forth in a November 25, 1997 letter addressed to the DOJ). In doing so, the staff incorrectly assumed that the Commission was authorized to consider the complainant's competitive arguments pursuant to the Commission's general "public interest" analysis under Section 310(d) of the Communications Act, 47 U.S.C. § 310(d).^{3/} As shown in Cumulus's initial Comments,

^{2/} To the best of Cumulus's knowledge, the Mass Media Bureau staff continues to defer action on certain unopposed radio station license assignment applications that, in the staff's view, raise potential market concentration issues where the staff has been informed that the Department of Justice ("DOJ") is actively investigating the proposed transaction. Cumulus believes that the Commission should also act promptly on these applications, some of which have already been pending for more than the 180-day period in which the Bureau generally acts on *contested* applications.

^{3/} See letter to John Griffith Johnson, et al. from Linda Blair, Chief, Audio Services Division (July 22, 1998 Ref. 1800B-IB), File Nos. BTC/H-971205GE through GH; see also *KIXK, Inc.*, FCC 98-166, 13 FCC Rcd ____ (released August 14, 1998) (considering issues of radio concentration pursuant to a "public interest" (continued...))

the public interest finding required by Section 310(d) cannot provide an independent statutory basis or authority for the Commission to impose a stricter local radio station ownership standard than is provided by the precise terms of Section 202(b) of the Telecom Act. Moreover, even assuming that the Commission had statutory authority to engage in such an analysis, the Bureau should not devote its scarce resources to duplicating the DOJ's antitrust review. Rather, the Bureau should properly defer to the judgments of the governmental entities primarily responsible for investigating such issues, consistent with its normal approach to allegations of anti-competitive conduct. ^{3/}

For similar reasons, the Commission's recently-implemented procedure of publishing "special" notations at the time that selected applications are accepted for filing, based primarily on BIA revenue share data, is ill-advised. The procedure appears to have been implemented without benefit of any Commission policy statement or other explanation of the factors that the Commission uses to select such applications or the factors that the Commission intends to consider in its "additional analysis of the ownership concentration in the relevant market." ^{5/} Such additional, unnecessary layer of regulation

^{3/} (...continued)
analysis in affirming staff's grant of license assignment application).

^{4/} See, e.g., *Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6680 (1992); *Policy Regarding Character Qualifications of Broadcast Licensees*, 102 FCC 2d 1179, 1202 (1986).

^{5/} See *Public Notice*, Broadcast Applications. Report No. 24303 (Aug. 12, 1998), pp. 2-4, 7-8.

— which, at best, is duplicative of the DOJ's antitrust review and, at worse, will lead to inconsistent results and confusion for the radio broadcast industry — will only result in further delays and demands on the Commission's resources.⁶ Moreover, without “guidance as to the type of evidence the Commission will consider in analyzing competition in a market,”⁷ licensees are and will continue to be deprived of the regulatory certainty and predictability needed to plan and engage in pro-competitive radio broadcast transactions, and the Commission will be unable to satisfy the requirements of reasoned decisionmaking.⁸

Some of the commentators in this proceeding suggest changes in the manner in which the Commission defines “markets” for purposes of applying the numerical station

⁶/ Given the delays that already have been experienced with applications presenting these issues, the Commission's new procedure casts serious doubt upon the Bureau's ability to adhere to its established “worst-case scenario” of acting within 180 days from the date of filing on all non-routine assignment and transfer applications (*i.e.*, applications that are contested or involve a waiver). *See Public Notice, Mass Media Bureau Announces Assignment and Transfer Backlog Reduction and New Speed of Service Initiatives*, 10 FCC Rcd 10612 (1995). As is already happening, the Commission will likely receive an increasing number of unsupported petitions to deny, many by competitors whose real agenda is to avoid competition by blocking radio acquisitions that comply fully with Section 202(b) of the Telecom Act and whose grant will improve service to listeners and benefit consumers.

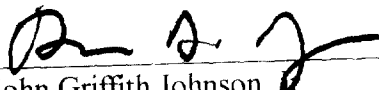
⁷/ Joint Statement of Commissioners Ness and Tristani, Station KBYB (FM), El Dorado, Arkansas, File Nos. BALH-961217GH and GI (Aug. 14, 1998), at p. 6.

⁸/ *See, e.g., Sangre De Cristo Communications, Inc., v. FCC*, 139 F.3d 953, 957-58 (D.C. Cir. 1998) (vacating and remanding where it was “unclear what the FCC believed to be the ‘relevant factors’ in its ruling” and where the FCC did not adequately explain the basis for its “public interest” assessment).

limits set forth in Section 73.3555(a) of the Commission's Rules. The suggested revisions could reduce the number of stations in a given market by the number of such stations that are either deemed to be not financially viable or inadequately rated for audience share. Cumulus disagrees with that approach. The financial viability and the audience ratings of stations can change depending upon a number of factors, some of which are within the control of the licensee, and therefore provide an inherently uncertain yardstick for measuring the number of stations in a given market. Acquirors and would-be acquirors need certainty when deciding how many stations can be acquired in a particular market. The current market definition methodology, based as it is upon objective criteria relating to predicted signal contours, provides such certainty. The only improvement that Cumulus would suggest is that the Commission allow parties in appropriate cases to supplement signal contour showings prepared in accordance with Section 73.313 of the Commission's Rules with showings prepared in accordance with Technical Note 101 of the National Bureau of Standards (*i.e.*, the so-called "Longley-Rice" methodology). Technical Note 101 provides in most cases a more accurate method for predicting the location of signal contours (witness the fact that it was used to construct the Commission's Table of Allotments for Digital Television Broadcasting Stations) than the Section 73.313 methodology.

Respectfully submitted,

CUMULUS MEDIA INC.

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August 21, 1998

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CERTIFICATE OF SERVICE

I, Carmen C. Archibald, a secretary in the law firm of Paul, Hastings, Janofsky & Walker LLP, do hereby certify that I have on this 21st day of August, 1998, caused a copy of the foregoing **REPLY COMMENTS OF CUMULUS MEDIA INC.** to be mailed to the following by first-class United States mail, postage-prepaid to Paul Hemmer, 2115 John F. Kennedy Road, Dubuque, Iowa 52002.

Carmen C. Archibald

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